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Supreme Court, U.S.
FILED
MAY 4 1998
CLERK

No. 97-1451

In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ASSOCIATION OF HOME BUILDERS, ET AL.,
PETITIONERS,

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF INTERIOR, AND MOLLIE BEATTIE, DIRECTOR, UNITED STATES FISH AND WILDLIFE SERVICE,
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION AND CALIFORNIA FARM BUREAU FEDERATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, consistent with the Commerce Clause, the United States Fish and Wildlife Service may regulate the "taking" of an endangered fly that lives solely within an eight-mile radius in California, has never been transported or traded in interstate commerce, and has no commercial value, solely on the basis that species protection in general "substantially affects" interstate commerce.

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BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION AND CALIFORNIA FARM BUREAU FEDERATION

INTERESTS OF THE *AMICI CURIAE*[1]

The American Farm Bureau Federation ("AFBF") is a voluntary general farm organization established in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico, representing more than 4.8 million member families. AFBF has participated as an *amicus* in this Court in support of property rights in cases such as *Lucas* v. *South Carolina Coastal Council*, *Dolan* v. *City of Tigard*, *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, *Bennett* v. *Spear*, and *Suitum* v. *Tahoe Regional Planning Agency*. *Amicus* California Farm Bureau Federation is a constituent member of AFBF, representing the interests of farmers and ranchers in the State of California, where the property at issue in this case is located.

The AFBF and California Farm Bureau Federation have a direct stake in the outcome of this case. Their farmer and rancher members own or lease significant amounts of land, and their ability to use it productively is critical not only to their livelihoods, but to the nation's supply of food and other basic necessities. Their land is increasingly subject to control by federal authorities acting under statutes such as the Endangered Species Act ("ESA" or "Act") and Clean Water

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici curiae*, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

Act. *Amici*, therefore, have a vital interest in ensuring that the Commerce Clause is interpreted reasonably, so as to limit federal regulation of local land use to activities that "substantially affect" interstate commerce.

In particular, farmers' and ranchers' use of their land has been severely restricted by application of ESA section 9 to ordinary, everyday farming activities that, according to the Fish and Wildlife Service ("Service"), constitute "habitat modification." By adopting overly broad interpretations of the ESA, the Service threatens to criminalize, as a matter of federal law, many well-accepted agricultural practices, and to chill the most productive uses of land. In consequence, *amici* have a strong interest in reversal of the Court of Appeals' ruling that the Commerce Clause authorizes federal regulation of land use affecting the habitat of a fly that lives solely in a small region of a single state, has never been transported or traded in interstate commerce, and has no commercial value.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *United States* v. *Lopez*, 514 U.S. 549 (1995), this Court established clear limitations on the scope of federal power pursuant to the Commerce Clause. To withstand a Commerce Clause challenge, federal regulation must regulate "activities that substantially affect interstate commerce." *Id.* at 558-559.

In this case, the Service applied the ESA to regulate the habitat of the Delhi Sands Flower-Loving Fly ("Fly")—an insect that does not exist outside an eight-mile radius in California, has never been transported or traded in interstate commerce, and has no commercial value. Pet. App. 25a, 42a-45a, 67a, 80a. The Service charged that San Bernardino County's construction of a public hospital complex would disturb the Fly's habitat, in violation of the Act. *Id.* at 73a. The County attempted to accommodate the Service—at an

additional cost to taxpayers of $3.5 million—by moving the complex some 250 feet, setting aside 8.35 acres of adjacent land as Fly habitat, and preserving a 100-foot wide "flight corridor" for the Fly. *Id.* at 29a. When it became clear, however, that preserving so broad a flight path prevented the County from modifying a nearby traffic intersection to ensure emergency access to the hospital, the parties reached an impasse, and this lawsuit ensued. *Id.* at 30a, 73a.

Purporting to apply *Lopez*, the Court of Appeals sustained the Service's actions. Although the majority opinions rested on different rationales, both held, in essence, that the mere "possibility" that the Fly might one day affect interstate commerce is sufficient to sustain federal regulation of its habitat. Pet. App. 52a. As this Court explained in *Lopez*, however, an activity does not "substantially affect" interstate commerce if one must "pile inference upon inference" to establish a nexus between the regulated activity and interstate commerce. 514 U.S. at 567. Rather, the Constitution requires some "concrete tie to interstate commerce." *Ibid.*

The decision below effectively repudiates the *Lopez* standard. First, the Court of Appeals impermissibly substituted generalities for concrete analysis. Openly acknowledging that even the *complete* destruction of the Fly's habitat would have no discernible impact on commerce, much less a substantial one, Judges Wald and Henderson each relied on Congress's purported interest in preventing habitat destruction *as a whole—i.e.*, in preserving "biodiversity"—to sustain the Service's actions. Pet. App. 54a, 68a. As we show in Part I, this unfocused approach contravenes the admonition of *Lopez* that Congress may regulate only noncommercial activities "hav[ing] an explicit connection with or effect on interstate commerce." 514 U.S. at 562.

Second, the Court of Appeals focused on the effect of federal regulation, rather than on the effect of the activity

being regulated, to conjure up a "substantial" effect on interstate commerce. As shown in Part II, however, if such a construction prevails, the Commerce Clause will no longer serve as a limiting principle, but rather will permit Congress to regulate virtually every area of law traditionally relegated to the States—a result completely inconsistent with the reasoning of *Lopez* and the intent of the Framers.

This case is of immense practical importance. Of the 1,082 species now designated as threatened or endangered, 521 (nearly half) are found in only one state. Pet. App. 50a. Thus, whether the Service may regulate activity affecting the habitats of such one-state species has recurring significance. Moreover, the decision below has implications in other areas, such as the Corps of Engineers' regulation of isolated wetlands under the Clean Water Act, in which Commerce Clause challenges commonly occur. See, *e.g.*, *United States* v. *Wilson*, 133 F.3d 251 (4th Cir. 1997). Immediate review of the Court of Appeals' erroneous decision is essential to preserve private land use and local regulation from constitutionally unwarranted federal interference.

The Court of Appeals sustained federal regulation of a species "which is neither commerce nor interstate." Pet. App. 76a. If the *Lopez* decision is to prove more than an aberration, this Court should grant certiorari to clarify the scope of Congress's Commerce Clause power.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN UPHOLDING THE CONSTITUTIONALITY OF THE SERVICE'S ACTION BASED UPON SPECULATION ABOUT THE COMMERCIAL EFFECTS OF BIODIVERSITY

In *Lopez*, this Court stressed the importance, in decisions delimiting the scope of federal power under the Commerce

Clause, of a *particularized* inquiry into the relationship between the economic activity being regulated and interstate commerce. "[D]epending on the level of generality, any activity can be looked upon as commercial." 514 U.S. at 565. Thus, the commerce power is limited to laws affecting "a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.* at 561.

The decision of the Court of Appeals demonstrates how courts can evade the holding of *Lopez* by categorizing conduct at an exceedingly high level of generality. Rather than look to the particular subject of the regulation at issue—the Fly—to determine whether the aggregate effects of degrading *its* habitat substantially affect interstate commerce, the majority opinions below focused on the commercial effects of biodiversity in general. Judge Wald, for example, openly acknowledged that "it is impossible to calculate the exact impact that the loss of the option value of a single species might have on interstate commerce." Pet. App. 54a. Nonetheless, she reasoned, "[i]n the aggregate" it is "certain that the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce." *Id.* Judge Henderson similarly concluded that "the loss of biodiversity itself has a substantial effect on our ecosystem and likewise on interstate commerce." *Id.* at 68a.

The relevant level of generality, however, is not the aggregate commercial effect of *species* degradation, but the aggregate commercial effect of activities that degrade the habitat of *the Fly*. *Wickard* v. *Filburn*, 317 U.S. 111 (1942), is instructive on this point. In that case, the Secretary of Agriculture assessed a penalty on an Ohio farmer for harvesting more wheat than was allotted under the Agricultural Adjustment Act of 1938. Because the penalty was calculated on the basis of wheat grown solely for on-farm consumption, the farmer challenged the application of the

Act, contending that such wheat was not part of interstate commerce.

The Court rejected that argument—not on the ground that agricultural transactions as a whole substantially affect interstate commerce—but by engaging in a particularized inquiry into the aggregate commercial effects of on-farm *wheat* production. 317 U.S. at 125-127. Noting that an individual farmer's "contribution to the demand for wheat may be trivial by itself," the Court found it dispositive that such a contribution, when "taken together with that of many others similarly situated, is far from trivial." *Id.* at 127-128. Viewed as a whole, "a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions." *Id.* at 128. Even "assum[ing] that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce." *Ibid.*

Even under *Wickard*'s reasoning—"which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity" (*Lopez*, 514 U.S. at 560)—the relevant focus is not on the aggregate commercial effect of the *class* of activity to which the regulated activity belongs (agricultural transactions there, species degradation here), but on the aggregate commercial effect of the *specific activities* at issue in the case (on-farm wheat consumption there, degradation of the Fly's habitat here). The Court of Appeals, however, focused on species protection in general. Only by resorting to so exaggerated a level of generality could the Court of Appeals discern a substantial effect on interstate commerce. In so doing, however, the D.C. Circuit dispensed with any "meaningful limits on the commerce power." *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring). See Pet. App. 82a (Sentelle, J., dissenting); *United States* v. *Wall*, 92 F.3d 1444, 1462 (6th Cir. 1996) (Boggs, J., dissenting in

part) (rationales offered to support constitutionality of federal regulation must have "a logical stopping point").

This is not to say that federal agencies are forbidden from regulating individual instances of species degradation that *do* substantially affect commerce. See *Lopez*, 514 U.S. at 561-562. For example, it would undoubtedly be constitutional for the Service to enforce the ESA against persons who sought to capture the Fly and transport it for sale. See, *e.g.*, *Champion* v. *Ames*, 188 U.S. 321 (1903). But engaging in activities that incidentally affect the habitat of a localized insect—whether constructing a public hospital or clearing a field for sowing—cannot be deemed to "substantially affect" commerce, as contemplated by *Lopez*.

Indeed, there is no evidence whatsoever that the Fly has any commercial value or effect, nor any sign that the Service, before listing the Fly and calling a halt to the County's hospital project, ascertained the requisite connection with commerce. See Pet. App. 67a (Henderson, J., concurring). Moreover, the Service has no constitutional authority to regulate purely noncommercial activities solely because "it is not beyond the realm of possibility" (*id.* at 52a) that they might one day affect commerce. See *id.* at 85a (Sentelle, J., dissenting) ("A creative and imaginative court can certainly speculate on the possibility that any object cited in any locality no matter how intrastate or isolated might some day have a medical, scientific, or economic value which could then propel it into interstate commerce").

As this Court explained in *Lopez*, federal power reaches only "intrastate activities that 'have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions' [that] are within Congress' power to regulate." 514 U.S. at 555. Regulation of the Fly's habitat bears no such relation to interstate commerce. As Judge

Sentelle explained in dissent below, "preventing destruction of local flies cannot reasonably be held to be either 'necessary' or 'proper' to keeping the channels of commerce free from their interstate transportation. While prohibiting the local possession and exchange of flies might arguably be necessary to preventing interstate transportation or exchange of flies, prohibiting destruction of fly habitat is not." Pet. App. 80a n.1. In sum, one must "pile inference upon inference" to find any sort of "concrete tie" between the Fly and interstate commerce. See *Lopez*, 514 U.S. at 567. To do so, however, would obliterate the "distinction between what is truly national and what is truly local." *Id.* at 567-568.

II. THE COURT OF APPEALS ERRED IN ANALYZING THE COMMERCIAL EFFECT OF THE REGULATION ITSELF, RATHER THAN THE COMMERCIAL EFFECT OF THE ACTIVITY BEING REGULATED

The Court of Appeals also erred in focusing on the commercial effect of the regulation, rather than on the effect of the activity being regulated. Judge Wald, for example, was persuaded by the fact that the ESA "regulates the taking of endangered species in the process of constructing a hospital, power plant, and intersection that will likely serve an interstate population." Pet. App. 63a. Similarly, Judge Henderson reasoned that "protection of the flies regulates and substantially affects commercial development activity which is plainly interstate." Pet. App. 68a. As the dissent recognized, however, "[n]owhere is it suggested that Congress can regulate activities not having a substantial effect on commerce because the regulation itself can be crafted in such a fashion as to have such an effect." Pet. App. 90a.

Indeed, if the federal government may regulate a noncommercial activity on the basis that the regulation *itself* causes a remote downstream effect on commerce, the

Commerce Clause as a limitation on federal power will be rendered a nullity. This logic would permit federal agencies to regulate marriage and divorce—traditional concerns of state law—on the ground that such regulation would have a substantial effect on the interstate market for family law services. And federal agencies could regulate primary schools—also a traditional state law concern—on the basis that such regulation would substantially affect the interstate market for school supplies or, as the court below found, "the current and future interstate commerce that relies on the availability of a diverse [supply of labor]." See Pet. App. 50a-51a. Regulation of local land use affecting a local species habitat is no more commercial than primary education, familial relations, or gun possession. See *id.* at 84a. Based on *Lopez*, all should be free from the heavy hand of federal regulation. See 514 U.S. at 565-567.

Contrary to the Court of Appeals (Pet. App. 42a-45a), it is not irrelevant "whether an intrastate activity is commercial or noncommercial." See *Lopez*, 514 U.S. at 566. While *Lopez* does not require that a regulated activity *directly* affect interstate commerce, it recognizes that there must be a point at which the activity's commercial effect becomes too tenuous to justify federal regulation. See *id.* at 567 ("There is a view of causation that would obliterate the distinction of what is national and what is local in the activities of commerce"); *United States* v. *Pappadopoulos*, 64 F.3d 522, 527 (9th Cir. 1995) (invalidating application of federal arson statute where only tie to interstate commerce was residence's receipt of out-of-state natural gas). Just as "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce" (514 U.S. at 567), neither is disturbance of the Fly's habitat. See Pet. App. 84a (Sentelle, J., dissenting) ("Neither killing flies nor controlling weeds nor digging holes is either inherently or funda-

mentally commercial in any sense"). In short, the specific "activity in question" must have a "concrete tie to interstate commerce," and no such tie has been shown here. 514 U.S. at 563, 567.

* * *

This is a case in which the Commerce Clause has been "extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (Hughes, C.J.).

The Service seeks to regulate the construction of a county hospital—an activity traditionally left to the domain of local land use law—solely because the facility threatens the habitat of a handful of flies that live only within an eight-mile radius in California, have never been traded in interstate commerce, and are totally devoid of commercial value. The decision below, if permitted to stand, threatens not only a badly needed county hospital in California, but vital public and private land use activities conducted every day throughout the country. If the constitutional limits on the commerce power set forth in *Lopez* are not to be rendered meaningless—and if the great experiment in federalism launched by the Framers is not to be shelved—the decision below must be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1998